Ketua Pengarah Hasil Dalam Negeri v Kim Thye & Co

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-38-91
MOHAMED AZMI, PEH SWEE CHIN AND EDGAR JOSEPH JR SCJJ
1 OCTOBER 1992

Revenue Law *— Appeal to Special Commissioners — Penalty imposed by Director General of Inland Revenue for incorrect return or information — Whether such penalty appealable to special commissioners — Income Tax Act 1967 ss 99(1) & 113(2)*

The respondents in filing their income tax returns caused the Director General of Inland Revenue ('the Director General') to miss charging them with timber profits tax. Subsequently, the respondents were assessed and charged with timber profits tax which they duly paid. The Director General subsequently imposed a penalty under s 113(2) of the Income Tax Act 1967 ('the Act'), on the ground of the incorrect return or information, the penalty being in effect 100% of the timber profits tax collected earlier, that is the amount of tax undercharged. The respondents sent a letter to the Director General together with a notice of appeal to the special commissioners. After some correspondence, the Director General wrote to the respondents and said that the appeal had been rejected by him and the respondents were asked to pay up the penalty sum as soon as possible. The respondents then applied to the High Court for an order of certiorari to quash the imposition of the penalty and for an order of mandamus directing the Director General to refer the appeal to the special commissioners. The learned judge of the High Court gave judgment for the respondents. The Director General appealed.

Held, dismissing the appeal:
A penalty imposed under s 113(2) of the Act is appealable to the special commissioners as an assessment referred to in s 99 of the Act, especially as there can be no unfettered discretion unless it is expressly enacted in the Act that such penalty under s 113(2) of the Act is not appealable to the special commissioners.

[Bahasa Malaysia summary

Penentang apabila mengisi penyata cukai pendapatan telah menyebabkan Ketua Pengarah Hasil Dalam Negeri ('Ketua Pengarah itu') terlepas mengenakan bayaran cukai keuntungan kayu balak. Kemudiannya penentang telah ditaksirkan dan dikenakan cukai bagi keuntungan kayu balak dan cukai itu telah dibayar. Ketua Pengarah itu kemudian telah mengenakan penalti di bawah s 113(2) Akta Cukai Pendapatan 1967 ('Akta itu') atas alasan penyata atau maklumat yang salah itu. Penalti itu berjumlah 100% cukai keuntungan kayu balak yang telah dipungut lebih dahulu, iaitu jumlah cukai yang dikenakan bayaran kurang. Penentang kemudiannya mengirim surat kepada Ketua Pengarah itu bersama dengan notis rayuan kepada pesuruhjaya khas. Selepas

surat menyurat dilangsungkan, Ketua Pengarah itu telah menulis kepada penentang menyatakan bahawa rayuan penentang telah ditolak dan penentang diminta membayar penalti yang dikenakan itu secepat mungkin. Penentang telah memohon kepada Mahkamah Tinggi untuk mendapat perintah certiorari membatalkan pengenaan penalti itu dan untuk perintah mandamus mengarahkan Ketua Pengarah itu merujukkan rayuan itu kepada pesuruhjaya khas. Hakim Mahkamah Tinggi yang arif telah memberi keputusan bagi pihak penentang. Ketua Pengarah itu telah membuat rayuan.

Diputuskan, menolak rayuan itu:
Penalti yang dikenakan di bawah s 113(2) Akta itu boleh dirayukan kepada pesuruhjaya khas, sebagai suatu taksiran yang dirujuk dalam s 99 Akta itu, lebih-lebih lagi kerana tidak akan terdapat budi bicara yang tidak terlepas dari belenggu kecuali ia digubal dengan jelas dalam Akta itu bahawa penalti seperti di bawah s 113(2) Akta itu tidak boleh dirayukan kepada pesuruhjaya khas itu.]

Cases referred to

1 *Government of Malaysia v Preston Corporation (M) Sdn Bhd* [1982] 1 MLJ 293 (folld)
2 *ABC v Comptroller of Income Tax, Singapore* [1959] MLJ 162 (refd)
3 *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 147 (refd)

Legislation referred to

Income Tax Act 1967 ss 91–96A, 99, 113

Appeal from: Originating Motion No 32–17–1987 (High Court, Muar)

Abdul Karim bin Abdul Jalil (Senior Federal Counsel) for the appellant.
K Sila Dass (K Sila Dass & Partners) for the respondents.

Cur Adv Vult

Peh Swee Chin SCJ (delivering the judgment of the court): In *Government of Malaysia v Preston Corporation (M) Sdn Bhd*[1] Wan Hamzah J (as he then was) held that a penalty imposed by the Director General of Inland Revenue under s 113(2) of the Income Tax Act 1967, was an assessment within the meaning of the word, and was therefore appealable to the special commissioners under s 99(1).

Apparently, this did not find acceptance from all quarters so the same issue was relitigated in the instant appeal, when Richard Talalla J in the Muar High Court again came to the same conclusion upholding what Wan Hamzah J (as he then was) decided. We feel it imperative to re-examine the same point in order to crystallize the position one way or another.

To recapitulate the salient facts, the respondents (hereinafter called 'the taxpayers'), using a heading entitled 'Purchase of Logs' in their income tax

returns, inter alia, apparently caused the Ketua Pengarah Hasil Dalam Negeri (hereinafter called 'the Revenue') to miss charging the taxpayers with timber profits tax. When the Revenue realized it, they assessed and charged the timber profits tax which the taxpayers duly paid apparently without protest and there has been no appeal from this assessment.

The Revenue, however, subsequently further imposed a penalty under s 113(2) of the Income Tax Act 1967 (hereinafter called 'the Act') on the ground of the incorrect return or information, the penalty being in effect 100% of the timber profits tax collected earlier, ie the amount of tax undercharged. The taxpayers did not agree with this penalty.

Sections 113(1) and (2) of the Act are set out below for ease of reference and comparison:

Section 113 — Incorrect returns:

(1) Any person who —

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives any incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit and shall pay a special penalty of double the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct.

(2) Where a person —

(a) makes an incorrect return by omitting or understating any income of which he is required by this Act to make a return on behalf of himself or another person; or

(b) gives an incorrect information in relation to any matter affecting his own chargeability to tax or the chargeability to tax of any other person,

then, if no prosecution under subsection (1) has been instituted in respect of the incorrect return or incorrect information, the Director General may require that person to pay a penalty equal to the amount of tax which has been undercharged in consequence of the incorrect return or incorrect information or which would have been undercharged if the return or information had been accepted as correct; and, if that person pays that penalty (or, where the penalty is abated or remitted under section 124(3), so much, if any, of the penalty as has not been abated or remitted), he shall not be liable to be charged on the same facts with an offence under subsection (1).

Aggrieved by the imposition of such a penalty, the taxpayers sent to the Revenue a letter dated 13 August 1984, together with a notice of appeal to the special commissioners with various grounds stated therein. The amount of timber profits tax was $62,173.90 which was the amount also of the penalty and the latter amount was objected to.

The Revenue in reply asked for certain particulars and information to be furnished to the Revenue no later than 30 days from the date of their letter

A dated 20 August 1984, and stated that this was, to quote: 'in order to expedite your outstanding appeal'.

The Revenue, at that stage, when referring to the outstanding appeal, no doubt referred to the appeal by the taxpayers to the special commissioners.

Some two years and eight months later, the Revenue wrote to the
B taxpayers and said the appeal had been rejected by themselves and the taxpayers were asked to pay up the penalty sum as soon as possible. It is safe to assume that the Revenue had shifted their ground by treating the taxpayers' appeal to the special commissioners as apparently an application or appeal to themselves for review for relief, thus precipitating the taxpayers' motion in court for an order of certiorari to quash the imposition of the
C penalty and for an order of mandamus directing the Revenue to refer the appeal to the special commissioners.

It would neither be essential nor even desirable to go into the merits or demerits with regard to the imposition of the penalty at this stage for reasons which will become apparent later. The question that was canvassed before us was cast in a pure question of law as to whether the said penalty
D imposed by s 113(2) of the Act was appealable to the special commissioners.

Section 99 is first set out below:

> Right of appeal
>
> (1) a person aggrieved by an assessment made in respect of him may appeal to
E the Special Commissioners against the assessment by giving to the Director General within thirty days after the service of the notice of assessment or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment for which the assessment was made (or within such extended period as regards those days or months as
F may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form.

The right of appeal speaks of a person being aggrieved by an assessment of the Revenue. Therefore the question whether the imposition of the said
G penalty is an assessment assumes immediate importance.

The definition of assessment in s 2 of the Act is then looked at. Assessment is simply defined as meaning 'any assessment or additional assessment'. It therefore does not assist anybody.

Resorting to the *Shorter Oxford Dictionary* (3rd Ed), 'To assess' means (1) 'to fix the amount of (taxation, fine, etc) to be paid by a person or
H community', (2) 'to impose a fine or tax upon, to tax, fine'.

Thus, for argument, by disregarding the provisions of the Act, the definition in the dictionary tends to support the taxpayers. The dictionary, though not to be taken as an authoritative exponent of meanings of words used in statutes, is an important means of ascertaining the ordinary sense of words in accordance with literal construction of words — the primary rule.
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The case of *ABC v Comptroller of Income Tax, Singapore*[2] was cited for the Revenue. In that case, Buttrose J mentioned in the course of judgment that assessment determined quantum of tax, involving a mathematical calculation and exercise of judgment. That case merely scratched the surface of the problem here, as no question of imposition of penalty was involved there,

but another totally different question of the validity of notices of assessment for lack of certain particulars on which the assessment was made.

The court in *ABC*[2] in the context of its own facts, appears to hold that assessment would be a matter of mathematical calculation of the quantum of tax, but one should not lose sight of the mention of the 'exercise of judgment', which in its basic form must necessarily involve a consideration of relevant circumstances. It is hardly debatable that a penalty under s 113(2) is normally imposed after such similar consideration.

It was argued to the effect, that on a comparison of s 113(1) and (2) of the Act, the Revenue, when imposing the penalty, need not be satisfied that the incorrect return or information was given in good faith whereas such good faith would preclude a conviction by the court in respect of s 113(1).

The learned judge found from s 113(2), a discretion vested in the Revenue, as to whether or not to impose a penalty thereunder. His Lordship said: '... He is given a discretion, a discretion which to my mind he cannot exercise at whim or fancy but after due consideration of all relevant facts and circumstances ...'.

The Revenue seemed to have harked back to the discarded theme of unfettered discretion, and if they did, and we have little doubt that they did, it would be of salutary effect to remind ourselves of the inspiring words of Raja Azlan Shah Ag CJ (as he then was) in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*[3] in which, while dealing with a claim for unfettered discretion, his Lordship said:

> I cannot subscribe to this proposition for a moment. Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite* (ante) and its progency compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realized that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days, when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasize what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place'.

Part VI of the Act begins with the heading 'Assessment and Appeals' and Ch 1 of such Pt VI deals with 'Assessment' and Ch 2 with 'Appeals'. It was submitted for the Revenue to the effect that the word 'assessment' in respect of which an appeal lay under s 99 in Ch 2 must be in the nature of assessment of tax and not of penalty as indicated by those sections in Ch 1.

It is true that among the sections in Ch 1, s 91 refers to making 'an assessment in respect of any tax-payers in the amount or additional amount of chargeable income and tax or in additional amount of tax ...' or words in similar vein in other sections. The word of penalty is conspicuously absent in the sections in Ch 1 except s 96A. These sections (other than

s 96A) in Ch 1 do have the tendency to veer towards the exclusion of penalty (as opposed to tax) when speaking of assessment but s 96A has somewhat the opposite effect. Section 96A has the sub-heading 'Composite Assessment' and refers to incorrect return or information and to any agreement in writing which the Revenue and the taxpayer may come to in respect of undercharged tax payable plus the amount of any penalty also under s 113(2). In such circumstances, the Revenue may make a composite assessment of tax and such penalty and serve a notice of such composite assessment. Section 96A provides that no appeal shall lie against such a composite assessment.

Now, seemingly, the words 'composite assessment' refer to both tax and penalty, suggesting that but for the penalty, the assessment would have been stated simply as 'assessment' without the adjective 'composite'. This tends to suggest that the penalty could be a matter of assessment or as a different or distinct component of assessment. The net result is, there is an ambiguity from the section in Ch 1. It, however, ought to be resolved in favour of the taxpayer as a taxing statute is penal in nature. A composite assessment is not appealable expressly under s 96A, but nothing really turns on this for the rationale must be obvious, no one should be allowed to resile from an argument to which he is a party. The provision for non-appealability shares the same consequence as the non-appealability of a consent order made in court.

The learned judge in the court below very rightly referred to Form J (which appears to be the prescribed form of notice of assessment of income tax) in which the penalty under s 113(2) is to be added to the main body of income tax as part of the income tax payable within 30 days from the receipt of Form J. The contents or format of Form J does make it look likely that penalty is part of assessment appealable to the special commissioners.

It was submitted for the Revenue that unlike Malaysia, in Commonwealth countries there were express provisions for appeal against the imposition of such a penalty. This does tend to support the proposition that such penalty is not appealable, as after all the Act must have been modelled on Britian's Income Tax Act or that of some other Commonwealth country, Malaysia being a rather junior member of such countries so that omission by oversight would appear to be unlikely.

On an overview, however, we are more readily inclined to the view that a penalty imposed under s 113(2), nothwithstanding, eg the preceding paragraph, is appealable to the special commissioners as an assessment referred to in s 99 of the Act for reasons stated above, especially that there can be no unfettered discretion unless it is expressly enacted in the Act that such penalty under s 113(2) of the Act is not appealable to the special commissioners of Income Tax.

We therefore confirm the decision of the High Court at Muar and the orders made there and dismiss the appeal with costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim